No. 18-726

IN THE

Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Maryland

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF REPRESENTATIVE-ELECT DAVID TRONE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Pursuant to Rule 37.2, Representative-elect David Trone respectfully requests leave to submit a brief as *amicus curiae* in support of appellants. Undersigned counsel provided notice of an intent to file this amicus brief to counsel for the parties on December 14, 2018, more than 10 days before this brief was due. Appellants' counsel has consented to the filing of this brief. Appellees' counsel has withheld consent.

Mr. Trone, a Democrat, was elected in November 2018 to represent the people of Maryland's sixth district in the House of Representatives. He will become a member of the 116th U.S. Congress on January 3, 2019. This case concerns whether Maryland's sixth district will retain its current form for the 2020 election cycle, when Mr. Trone hopes to stand for re-election. The evident intent of the appellees, plaintiffs below, is to ensure that the sixth district will be redrawn to make it more difficult for Mr. Trone or a member of his political party to prevail in the 2020 election. Mr. Trone campaigned throughout the sixth district in 2018 and believes he understands its ethos. As a politician on the frontier of the partisan gerrymandering issue and a member of the next Congress, he has concluded that the three-judge court's decision is impracticable and potentially harmful, and that solutions should come from Congress. None of the parties in this case has Mr. Trone's perspective and no one, he believes, is more directly affected by the ruling below than he is.

Accordingly, Mr. Trone respectfully requests that the Court grant his motion for leave and accept the attached brief for filing in this matter.

December 19, 2018

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae David Trone has been elected to represent the people of Maryland's sixth district in the House of Representatives and will become a member of the 116th U.S. Congress on January 3, 2019. Mr. Trone first ran for office in the 2016 Democratic primary for Maryland's eighth congressional district, finishing second. On August 2, 2017, he announced his candidacy for an open seat in the adjacent sixth district and thereafter campaigned extensively throughout the district. In June 2018, he won the Democratic Party nomination over four challengers. The Washington Post endorsed Mr. Trone in the general election "by a mile" over a Republican candidate who had "dismissed Montgomery County, where she and a big chunk of the district's constituents live," in favor of the more Republican-leaning sites in the west of the district. Editorial Board, *David Trone for Congress in Maryland*, Washington Post (Oct. 22, 2018). On November 6, 2018, Mr. Trone won the general election with 59 percent of the vote, compared with 38 percent for the Republican candidate and about 3 percent for other candidates.

Mr. Trone is a Maryland native who grew up on a struggling family farm in south central Pennsylvania, near the Maryland border. He completed graduate business school and started a small business in Pennsylvania, and then moved to Montgomery

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[1] No counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* or his counsel made a monetary contribution for the preparation or submission of this brief. The parties received notice of this filing.

County, Maryland, where he and a brother built and ran one of the country's largest and most successful retailers of wine and other beverages. The company is based in Montgomery County and today employs more than 4000 people nationwide. Mr. Trone and his wife raised four children in Montgomery County, where Mr. Trone once coached 13 different youth sport teams in a single year. He has contributed millions of dollars to local and national charities.

Mr. Trone's unusual background in conservative-leaning endeavors like farming and entrepreneurship, layered against an extensive history of liberal philanthropy, helped him connect with voters throughout the sixth district. The district encompasses an historic corridor of Maryland that runs from the commuting exurbs of Washington D.C. into rural communities rooted in farming, manufacturing, and tourism. At one time the political and commercial interests of the district were roughly linked by the original route of the Baltimore & Ohio Railroad and by the Chesapeake & Ohio Canal, two of the State's greatest public works projects. Today the district is defined more by Interstates 270 and 70, along with the non-navigable, upper reaches of the Potomac River and its tributary, the Monocacy. Mr. Trone believes the people of the district today, while broadly split among the two major political parties, are not deeply conservative or liberal, but instead are united by a pragmatism and industriousness that suits his background and personality. He is honored to be their representative and hopes they re-elect him in 2020. He desires that the sixth district retain its current form until then.

SUMMARY OF ARGUMENT

This Court has struggled to find a workable test that will define constitutional limits on partisan gerrymandering. The resulting uncertainty is not a jurisprudential flaw; it is a feature of competing constitutional values that cannot be easily reconciled. Ignoring this reality, the three-judge court gave life to the aphorism that for every complex problem there is an answer that is clear, simple, and wrong. The court fashioned and applied a concise three-part test that yielded an absurd result: the invalidation, as an excessively partisan gerrymander, of a redrawn congressional district that is geographically compact and politically competitive; is more compact and competitive than the one it replaced; and is far more competitive than the state as a whole.

Perhaps the quest for a simple test to measure unconstitutionally partisan gerrymandering is worth pursuing. But not in this case, which is easily resolvable by accepting that a redrawn district is constitutional if it satisfies any one of five objective measures of the geographical shape and political composition of the redrawn district, rather than by requiring a review of the conduct and the subjective intent of legislators, map-drawers, voters, and other stake-holders in the redistricting process. In this case, the Court should hold that a redrawn congressional district is not subject to constitutional attack for partisan gerrymandering, regardless of the multiple reasons it was redrawn, if the resulting district is:

1. Reasonably compact and cohesive;

2. More compact and cohesive than its predecessor;
3. Reasonably competitive as measured by the percentage split in party registrations;
4. More competitive, as measured by the percentage split in party registrations, than its predecessor; or
5. More competitive than the state-wide split in party registrations.

Maryland's re-drawn sixth district meets all five of these criteria, but any one should be enough to pass constitutional muster. The Court has been clear that a partisan motive is not enough to invalidate a redrawn district. *E.g.*, *Gaffney* v. *Cummings*, 412 U.S. 735, 752-53 (1973). A natural corollary is that a re-drawn district that has geographic or political cohesion, or that diminishes objective measures of partisanship when compared with the prior district, cannot be unconstitutional even if partisanship was a significant force in the redistricting process. A redrawn district that meets those criteria is fundamentally within the purview of the state's political actors. Only if a re-drawn district violates these criteria should the judiciary examine the subjective intent of the redistricting authorities or the individual harms to voters.

Adopting one or more of these neutral principles may not resolve every case of partisan gerrymandering, but it will provide clear, achievable, and constitutional targets for redistricting personnel. And it will supplant the dangerous precedent reached by the three-judge court in this case, in which a finding of sufficiently partisan intent inevitably results in a constitutional injury, and an order to

redraw a district that is perfectly satisfactory as a constitutional matter and could very easily become more partisan as a result of the order.

ARGUMENT

I. HISTORY, GEOGRAPHY, AND POLITICAL DEMOGRAPHY OF MARYLAND'S SIXTH DISTRICT

In assessing the redrawn sixth district, the court below focused mostly on what it saw as partisan intent in repositioning clusters of voters after the 2010 decennial census. Mixed into its assessment of intent, however, was some commentary about the geographic and demographic characteristics of the new district. The tenor of the commentary was that the new district made less sense than the old because it traded large portions of four northern and eastern counties for a section of western Montgomery County. *See* JS App. 54a.

The court's commentary was misguided. The redrawn sixth district has a firm historical grounding and is more geographically and politically cohesive than the one it replaced. The three-judge court observed that "[s]ince 1966," the sixth district included "all of Maryland's five most northwestern counties – Garrett, Allegany, Washington, Frederick, and Carroll Counties." JS App. 5a. But the 1966 map was not drawn by state politicians; it was drawn by an earlier three-judge court that had concluded the unequal populations in the existing districts violated the Supreme Court's "one person, one vote" rule. *See Maryland Citizens Comm. for Fair Cong. Redistricting, Inc.* v. *Tawes*, 253 F. Supp. 731, 734 (D.

Md. 1966). By contrast, from 1872 through 1966, all of Montgomery and Frederick counties were included with the three western counties in a single congressional district. *See* ECF 186-17, at Maps 7-10. Moreover, in 1972 the sixth district included portions of northern Montgomery County, *see id.* at Map 12, and after the 1980 census the sixth district was redrawn to include large portions of western and northern Montgomery. *Id.* at Map 13. Montgomery became essentially its own district after the 1990 census, *id.* at Map 14, but was then fragmented after the 2000 census, with a small arm in the north of the county assigned to the sixth district. *Id.* at Map 15.[2]

This 2002 map remained in place through the 2010 elections and became the baseline for the three-judge court's assessment of the current sixth district. The 2002 (baseline) and 2011 (current) maps are reprinted below as they were introduced in the record (excluding their inserts, which focused on other districts). *See* ECF 186-14, 186-15. The sixth district

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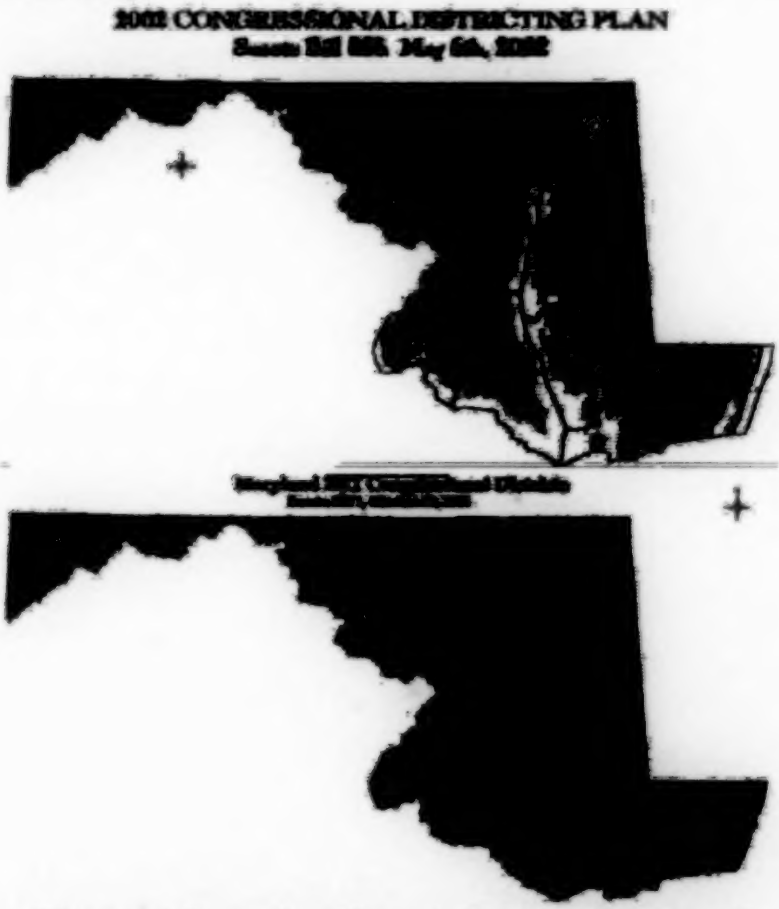
[2] Prior to the 1992 redistricting, voters in the sixth district had a long history of electing members of both parties, many of them moderates. Starting in 1911, the succession ran: Democratic (1911-17, David J. Lewis); Republican (1917-31, Frederick N. Zihlman); Democratic (1931-39, David J. Lewis); Democratic (1939-41, William D. Byron); Democratic (1941-43, Katharine Byron); Republican (1943-53, James G. Beall); Republican (1953-59, DeWitt S. Hyde); Democratic (1959-61, John R. Foley); Republican (1961-69, Charles M. Mathias Jr.); Republican (1969-71 John G. Beall Jr.); Democratic (1971-78, Goodloe E. Byron); Democratic (1979-93, Beverly Butcher Byron). After the 1992 redistricting, the seat was held for 20 years by Roscoe Bartlett, a conservative Republican. *See* Maryland's 6th congressional district, Wikipedia, available at https://en.wikipedia.org/wiki/Maryland%27s_6th_congressional_district (last accessed Dec. 12, 2018).

is salmon in the 2002 map and light green in the 2011 map.



The court focused on the net change in Democratic- or Republican-registered voters in the district without acknowledging that the redrawn district was more compact and cohesive than its predecessor. As shown above, the 2002 map extended from the Susquehanna River in the east all the way to the State's western border, encompassing large pieces of Harford and Baltimore counties that have never been

meaningfully connected with western Maryland. *See* ECF 186-8, at 18, 20. Even Carroll County has minimal cultural connection to western Maryland. Harford, Baltimore, and Carroll counties are all part of the Baltimore-Columbia-Towson metropolitan statistical area.

By contrast, the northern and western portions of Montgomery County in the current sixth district are closer to the western counties and have long been politically and culturally associated with them. Historically, the district was connected by the Potomac River, by the Chesapeake and Ohio Canal that runs alongside it, and by the original western line of the Baltimore & Ohio Railroad. The B&O, running west from Baltimore along the Patapsco, turned south just below Frederick and ran roughly along the Frederick corridor of the current district, before turning west along the Potomac toward the coal fields in the western counties (crossing into what is now West Virginia for a stretch). A spur into Frederick opened in 1831, forming the Frederick Branch that still carries commuters today under the banner of the State's MARC service. The development and operation of the C&O Canal and B&O Railroad were major political issues in Maryland in the 19th Century, when regional political blocs often sought state investment and support for railways and canals. The Canal in particular was a longtime financial albatross for the State and was a major funding concern at the State's 1867 Constitutional Convention before it finally stabilized, at least for a time, in the late 19th Century. *See, e.g.*, REPUBLICAN PRESS AT A DEMOCRATIC CONVENTION 788-816 (J. Connolly ed. 2018) (reprinting convention debates). The Canal and the Railroad were western Maryland's

principal commercial corridors before the proliferation of the automobile and they created common interests for communities along the line.

Today, the district remains connected by the Potomac and Monocacy rivers. The Canal right-of-way is now a popular linear park that traverses most of the district. And the most heavily populated sections are connected by the I-270/I-70 corridor running north and west out of Washington D.C. This corridor is the State's modern growth engine, forming its own community of technology and other modern businesses and institutions. *See* ECF 186-17, at 19; ECF 186-8, at 15, 18, 22. (The national headquarters of Mr. Trone's business is situated at the base of the corridor, just outside the district.)

The redrawn sixth district is not perfectly geometric – a near impossibility in Maryland – but it is reasonably compact and cohesive given Maryland's odd shape and the constitutional requirement of proportionate representation. The State introduced ample evidence from highly qualified experts explaining that the redrawn district possessed demographic, economic, and transportation cohesiveness. *E.g.*, ECF 186-17, at 17-18. What's more, the three-judge court never tried to explain why the new map was less geographically, historically, or culturally cohesive than the prior map, preferring to focus on the relative *changes* in political-party registrations.

This was a flawed methodology because the preexisting sixth district was no paragon of nonpartisanship; it was instead drawn to provide a safe seat for Republicans. If the test for constitutionality turns on party-registration changes

from one map to the next, the relevant measure should not be the total swing from one party to the next, but the net change in competitiveness; i.e., whether the district is more or less competitive, regardless of which party has the edge.

This point is readily established through numbers furnished by plaintiffs' expert witness, Michael P. McDonald. In attempting to show the voter "swing" in the redrawn sixth district, a concept credited by the three-judge court, Dr. McDonald reported the following statistics (correcting for trivial errors):

	Benchmark [2002]		Adopted [2011]		Change
	Number	Percent	Number	Percent	Number
Demo.	159,661	35.8%	184,120	44.8%	24,459
Repub.	207,966	46.7%	141,548	34.4%	-66,418
No Pty	77,892	17.5%	85,535	20.8%	7,643
Total	445,519	100.0%	411,203	100.0%	-34,316

Thus, Dr. McDonald and the court focused on a swing of 90,877 party registrations (24,459 more Democrats plus 66,418 fewer Republicans). As shown in the table below, however, the redrawn sixth district was more competitive than the 2002 version when measured by the relative differences among the two major parties.

	Benchmark [2002]		Adopted [2011]	
	Number	Percent	Number	Percent
Dems – Reps	-48,305	-10.8%	42,572	10.4%
(Reps+NP) - Dems	126,197	28.3%	42,963	10.4%
Reps – Dems	48,305	10.8%	-42,572	-10.4%
(Dems+NP) - Reps	29,587	6.6%	128,107	31.2%

This table shows that the percentage difference between registrations for the two major parties was slightly less in 2011 (10.4 vs. 10.8 percent). Further, Democrats had a smaller registered-voter advantage in 2011 than Republicans had in 2002 (42,572 vs. 48,305). Finally, if the Republican candidate in the redrawn district carried the nonaligned voters, the Republican would have had a substantially greater chance of defeating a Democrat than the other way around under the prior map (Republicans plus No Party outweighed Democrats by 42,963 in 2011, while Democrats plus No Party outweighed Republicans by only 29,587 in 2002). This type of result is not unprecedented in Maryland, which is all the more reason why courts should be cautious to declare constitutional injuries by gerrymandering. Maryland's most conservative district, the first, is generally a Republican stronghold. The Republican candidate prevailed there in every election from 1990 through 2006, winning by 53, 52, and 38 points in the elections of 2002 to 2006. *See* Md. State Bd. Elections, Elections by Year, Representative in Congress (elections of 2002 through 2006).[3] But in 2008, with

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[3] Available at
https://results.elections.maryland.gov/elections/2002/results/g_representative_in_congress.html;
https://results.elections.maryland.gov/elections/2004/general/congress.html;
https://results.elections.maryland.gov/elections/2006/results/general/office_Representative_in_Congress.html.

no change in district boundaries, the Democratic candidate won. *See id.* (election year 2008).[4]

Moreover, the redrawn sixth district was significantly more competitive than the State as a whole. In 2012, Democrats comprised 55.7 percent of all registered voters in the state, versus 26.0 percent for Republicans – a ratio of more than 2.1 to 1, and a percentage-point spread of 29.8. *See* Md. State Bd. Elections, Eligible Active Voters on Precinct Register (as of Oct. 21, 2012).[5] The redrawn sixth district, by contrast, has a Democrat-to-Republican ratio of 1.3 to 1 and a percentage-point spread of only 10.4. By these absolute measures, the redrawn sixth district is substantially more competitive than Maryland as a whole. And the sixth district proved to be the most competitive of Maryland's eight congressional districts in the 2018 general election, *see* Md. State Bd. Elections, Elections by Year, Representative in Congress (election year 2018),[6] suggesting that the district had returned to its historical competitiveness under the challenged map.

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[4] Available at https://results.elections.maryland.gov/elections/2008/results/general/gen_results_2008_4_008X.html.

[5] Available at https://results.elections.maryland.gov/press_room/documents/PG12/PrecinctRegisterCounts/statewide.pdf.

[6] Available at https://results.elections.maryland.gov/elections/2018/results/general/gen_results_2018_2_008X.html.

II. THE COURT SHOULD ENDORSE OBJECTIVE CRITERIA THAT ESTABLISH WHEN A REDRAWN DISTRICT IS NOT SUBJECT TO CONSTITUTIONAL ATTACK

The three-judge court acknowledged that the Constitution gives authority to draw election districts to the political branches of the state and federal governments. JS App. 31a, 33a (citing U.S. Const. art. I, § 2, cl. 1 & art. I, § 4, cl. 1). The court further recognized that this Court has addressed the constitutionality of partisan gerrymandering in a series of cases, most arising under the Equal Protection Clause, and has never invalidated a district on that basis or even settled on a clear standard for doing so. *See* JS App. 38a. In Amicus's view, the facts of this case are well within existing Equal Protection precedents, clearly foreclosing any relief under that clause. *See, e.g., Vieth* v. *Jubelirer*, 541 U.S. 267, 281 (2004) (plurality); *Davis* v. *Bandemer*, 478 U.S. 109 (1986); *Gaffney* 412 U.S. at 752-53; *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 423 (2006) (plurality) [hereafter, "*LULAC*"].

Doubtless because of these precedents, plaintiffs in this case sought relief under the First Amendment, and the three-judge court found in that Amendment a test for partisan gerrymandering that is notable for its breadth as much as for its novelty. After 50 years of this Court's rejecting constitutional challenges to partisan gerrymandering, the divided three-judge court found (through different two-judge majorities) *two* justiciable violations of the First Amendment. The tests it fashioned for proving these violations,

moreover, turned out to be quite easy to satisfy, and if endorsed by this Court it would effectively nullify longtime judicial reticence about intruding on congressional redistricting.

Two of the three judges below (Niemeyer and Russell, JJ) found that plaintiffs could prove a violation of their First Amendment representational rights by establishing (1) that the state actors drew the map with "specific intent" to burden them "because of how they voted or the political party with which they were affiliated"; (2) that the redrawn district diluted their votes "to such a degree that it resulted in a tangible and concrete adverse effect"; and (3) that the intent to burden was a but-for cause of the adverse effect. JS App. 59a. The same two judges found that plaintiffs could prove a violation of their First Amendment associational rights by proving the same elements, except that element (2) required proof of a burden on the "targeted citizens' ability to associate in furtherance of their political beliefs and aims." *Id.* (Chief Judge Bredar concurred in the associational-rights holding, but on somewhat narrower grounds.)

The three-judge court's decision has some grounding in Justice Kagan's concurring opinion in *Gill* v. *Whitford*, 138 S. Ct. 1916, 1934 (2018), and in Justice Kennedy's earlier concurring opinion in *Vieth*. *See* 541 U.S. at 314-16. By contrast, the plurality in *Vieth* was skeptical of a First Amendment basis for partisan gerrymandering claims, "for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in

hiring for non-policy-level government jobs." *Id.* at 294.

The three-judge court's decision in this case proves the *Vieth* plurality's point. The court's two tests for First Amendment justiciability turned out to be very easy to satisfy – so easy that the court granted a permanent injunction on plaintiffs' motion for summary judgment, relying extensively on unreliable hearsay. Plaintiffs might answer that the test was satisfied because the facts were egregious, but that is unpersuasive for two reasons. To be sure, the record included ample evidence that some state officials intended the sixth district to lean Democratic. But as Appellants' Jurisdictional Statement explains, it also included evidence of nonpartisan intent, *see* JS 5-7, and nothing in the record suggested a specific intent not to comply with the law as articulated by this Court. That law has been clear for decades that extensive partisan intent in redistricting is permissible, at least if the challenge is brought under the Equal Protection clause. *E.g.*, *Gaffney*, 412 U.S. at 752-53. The three-judge court fundamentally confused partisan intent, which is clearly permissible, with unlawful intent to harm specific voters because of their party affiliation, which was not remotely proven.

More important, the tests fashioned by the three-judge court are satisfied in nearly every case where political actors control redistricting and the prevailing voter registrations in the redrawn district change from one party to the other. The intent element of the three-judge court's test, although ostensibly requiring a "specific intent" to burden voters based on their prior votes or party affiliation,

in fact requires nothing more than proof of an intent that the redrawn district favor one party over the other. It might have been a different case if the three-judge court required, for instance, proof that redistricting officials curved an otherwise straight boundary around the house of a specific political opponent in retaliation for that opponent's political affiliation, or speech. But nothing like that happened in this case, and as a practical matter the court's "specific intent" element is readily provable. After that, the other two elements – causation and damages – are gimmes. A few voters testify about their political ennui after redistricting, and the case is over. Indeed, in this case, the court did not even require first-hand testimony.

Nothing in this Court's precedents, or in the three-judge court's decision, explains why partisan gerrymandering challenges should be easier to win under the First Amendment as compared to the Fourteenth. The questions that have animated jurisprudence in this area for decades are "what is necessary to show standing in a case of this sort, and whether those claims are justiciable." *Gill*, 138 S. Ct. at 1929. These questions are aimed at ensuring that the judiciary respects its limited role. *Id.* In *Gill*, decided just last term, seven justices agreed that "[f]oremost among these requirements is injury in fact — a plaintiff's pleading and proof that he has suffered the invasion of a legally protected interest that is concrete and particularized, i.e., which affect[s] the plaintiff in a personal and individual way." *Id.* (quotation marks omitted).

The alleged First Amendment injuries in this case were essentially identical to the injuries alleged in

the Equal Protection cases: dilution of the plaintiffs' vote, or their enthusiasm to vote, because of a perception that their party's candidate will not win. Despite the three-judge court's attempt to frame the plaintiffs' injury as personal, partisan gerrymandering cases are by nature impersonal. If the intent is to "flip" a district, as the three-judge court believed, the target is the district as a whole, not any individual voter.

This Court may not want to declare a broad rule equating the justiciability standard for partisan gerrymandering challenges under the First and Fourteenth amendments. As noted, for instance, the First Amendment might provide relief if map-makers specifically re-districted a political opponent who criticized the re-districters. But that is not remotely what happened in this case.

Instead, Amicus suggests that the Court proceed cautiously, as it has done for decades in this area, by holding that any number of objective principles preclude relief in this case and others like it, whether the claim is under the First or Fourteenth Amendments. Those principles are set forth in the next section.

III. BY REASONABLE OBJECTIVE MEASURES, MARYLAND'S REDRAWN SIXTH DISTRICT IS NOT SUBJECT TO CONSTITUTIONAL ATTACK FOR PARTISAN GERRYMANDERING

The Court should reverse the judgment below because at least five objective and undisputed facts should put this case beyond the reach of constitutional challenge. A decision on these grounds

would not foreclose all challenges to partisan gerrymandering under the First or Fourteenth Amendments, but it would establish clear safe harbors for map-makers that accommodate competing constitutional principles: namely, that the Constitution commits re-districting authority to political actors and does not prohibit partisanship in the process, yet also affords each citizen a right to cast a vote that counts as much as any other citizen's vote. It will also permit Congress to fashion a national solution to partisan gerrymandering that will possess a political legitimacy that can come only from federal legislation.

First, the Court should hold that a redrawn district that is reasonably compact and cohesive is not subject to a collective gerrymandering challenge even if the redrawn map was intended to, and does, change the district's prevailing party affiliation. Permitting such challenges would unreasonably intrude on state officials' constitutional power to draw congressional election districts, and to consider partisan interests as they do so. *See, e.g.*, *Gaffney*, 412 U.S. at 754 ("neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State"). Whatever limits the Constitution imposes on partisan gerrymandering, they cannot be crossed if the new district has reasonable geographic and cultural cohesion.

Second, the Court should hold that a redrawn district is not subject to a collective gerrymandering challenge if the map is more compact and cohesive than its predecessor. The *ne plus ultra* of nonpartisan districting is probably a geometric grid transposed over a state map with lines adjusted as little as possible to ensure equal populations per district. Perfect nonpartisanship may be impossible but movement in that direction should not be subject to punishment. Absent evidence that map-makers specifically targeted individual voters in violation of their constitutional rights, a district that becomes more compact and cohesive than its predecessor cannot give rise to a "concrete and individualized" injury, even if the district "flips" as a whole.

Third, the judiciary should not adjudicate partisan gerrymandering claims if the redrawn district is reasonably competitive as measured by the percentage split in party registrations. If a district is politically competitive, there can be no injury of a constitutional dimension regardless of the map-makers' intent.

Fourth, partisan gerrymandering claims should not be justiciable if the redrawn district is more competitive than the prior district, as measured by the percentage split in party registrations. Again, State officials should not be discouraged from making a district less partisan, even if the result is not perfect.

Finally, partisan gerrymandering claims should not be justiciable if the redrawn district is more competitive than the State as a whole. *See Gaffney*, 412 U.S. at 754 ("judicial interest should be at its lowest ebb when a State purports fairly to allocate

political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so"); *LULAC*, 548 U.S. at 419 (Kennedy, J.) ("a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority"). In that instance, no individual citizen in the redrawn district can possibly establish the type of concrete and individualized injury required for justiciability. Every citizen in the redrawn district who could claim an injury of any kind is by definition in a more favorable position than he or she has a right to expect.

As set forth above in Part I, the record in this case establishes each of these criteria. The second, fourth, and fifth items are essentially incontrovertible and are easily applied in other cases. The first and third require some judgment in individual cases, including this one, but they are amply supported by the record in this case. In any event, the five criteria considered as a whole should establish beyond question that the three-judge court's sweeping decision in this case should be reversed.

* * * *

The three-judge court's evident exasperation with partisan gerrymandering may have impelled it to find a judicial solution. *See, e.g.*, JS App. 67a (Bredar, C.J., concurring) ("Partisan gerrymandering is noxious, a cancer on our democracy."). Amicus himself is no fan of partisan gerrymandering, but that does not mean it is a terminal disease, much less one that the judiciary can or should cure. The district-by-district resolutions that would come from judicial review of partisan gerrymandering claims

can only mire the courts in partisan politics. Were this Court to invalidate a Democratic district in a strongly Democratic state like Maryland, Democrats nationwide would cry foul, and rightly question why Republican gerrymanders in Republican-controlled states are not subject to the same scrutiny.[7]

The absence of a broad-based judicial solution does not consign the republic to live with partisan gerrymandering. On the contrary, the Constitution gives Congress secondary authority to "make or alter" the States' primary authority to prescribe the "Times, Places and Manner of holding Elections ... for Representatives." U.S. Const. art. I, § 4; *see* The Federalist No. 59 (A. Hamilton). Congress's power almost certainly includes the ability to curtail or eliminate partisan gerrymandering at the national

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[7] Plaintiffs' and the three-judge court's insistence that gerrymandering is anti-democratic is true in theory, but not necessarily in practice. Amicus agrees that the democratic ideal is a complete absence of partisan gerrymandering (and he would readily support nationwide legislation that accomplishes that goal). But if some partisan gerrymandering is permitted (or occurs even if not permitted), democracy is hindered, not helped, when one party engages in it and the other does not. Congress is a national legislature; a single state's delegation achieves nothing by itself. If, hypothetically, a Republican-gerrymandered delegation from North Carolina is not offset to some degree by a Democratic-gerrymandered delegation from Maryland, representation in Congress will be less reflective of the electorate as a whole. This is why a national legislative solution is so critical. Judicial solutions will always have problems of timing (because gerrymandering challenges will not be decided in all districts at the same time), as well as precision (because courts cannot legislate clear anti-gerrymandering rules, but can only fashion standards as derived from broad Constitutional text).

level, *see Vieth*, 541 U.S. at 276-77; *Davis*, 478 U.S. at 143-44 (Burger, C.J., concurring), and Congress has often considered bills that would fashion a nationwide solution. *E.g.*, Citizen Legislature Anti-Corruption Reform Act, H.R. 145, 115th Cong., § 5 (1st Sess. 2017) ("Each State shall conduct Congressional redistricting (beginning with the redistricting carried out pursuant to the decennial census conducted during 2020) in accordance with a redistricting plan developed by a nonpartisan independent redistricting commission."). A decision by this Court endorsing the three-judge court's judgment and rationale will undermine decades of precedent and disrupt settled expectations about what is permissible in redistricting. The elimination of partisan gerrymandering is a desirable goal, but only Congress can ensure that the remedy applies uniformly throughout the Nation.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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